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IN THE

# Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-1075

ISABEL GONZALEZ, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1975

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NO. _____

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ISABEL GONZALEZ, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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Petitioner prays that a writ of certiorari to review the judgment of the Court of Criminal Appeals of the State of Texas, entered in the above cause on October 31, 1975.

## OPINION BELOW

The opinion of the Court of Criminal Appeals is printed in Appendix A of this petition. It has not yet been reported.

## JURISDICTION

The judgment of the Court of Criminal Appeals, printed as Appendix B of this petition, was entered on October 31, 1975, at which time Petitioner's Motion for Leave to File Motion for Rehearing was also denied. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

## QUESTION PRESENTED

Does a sworn petition filed by Petitioner's mother-in-law in which she stated that Petitioner "has such serious psychiatric problems that all parental rights to said children should be terminated" combined with the bizarre murder of his wife in front of his children raise a bona fide doubt as to Petitioner's competence to stand trial sufficient to require the Trial Court on his own motion to order a hearing to determine Petitioner's competence to stand trial.

## CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is Amendment XIV, Section 1 to the Constitution of the United States of America which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner was divorced from his wife and given reasonable rights of visitation with his two children, a boy aged 2 at the time of the incident and a girl aged 1. During the afternoon of July 15, 1973, Petitioner took his son riding with him, returning to his ex-wife's home at approximately 8:40 P.M. Petitioner demanded that his ex-wife permit him to take his daughter with him. When she refused, Petitioner fired four shots at her, one or more of which struck her in the chest. At the time of the shooting, Petitioner's small son was in the car with him, and witnessed the entire incident. Petitioner then left the area at a high rate of speed.

As a result of this incident Petitioner was indicted for murder with malice. The State then agreed to reduce this charge to murder without malice. On September 24, 1974, Petitioner pled Nolo Contendere to the charge of murder without malice. He was represented by retained counsel. This firm did not represent Mr. Gonzalez at his original hearing and had no contact with him until the Texas Court of Criminal Appeals affirmed the conviction.

During the course of the hearing on the plea of Nolo Contendere, Petitioner entered into evidence a sworn Petition for Adoption filed by Petitioner's ex-mother-in-law in which she stated that Petitioner "has such serious psychiatric problems that all parental rights to said children should be terminated." Appendix "C". This was called to the Court's attention when Petitioner's attorney stated, "We would offer this in evidence and call particular attention to paragraph six."[1]

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1. Appendix D, S.F. 10.

## REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The question presented here is whether the bizarre murder of Petitioner's wife in front of his children together with the sworn petition of Petitioner's mother-in-law stating that he has "such psychiatric problems that all parental rights to said children should be terminated" raise a bona fide doubt as to Petitioner's competence to stand trial sufficient to require the trial court judge to require a hearing to determine Petitioner's competence to stand trial.

This Court has repeatedly held that the conviction of an accused while he is incompetent violates his rights to due process of law. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966). *Bishop v. United States*, 350 U.S. 961, 76 S. Ct. 440 (1956).

In *Pate v. Robinson*, supra, the Court recognized the affirmative duty of the trial court to conduct a sanity hearing on his own motion any time the evidence raises a "bona fide doubt as to the defendant's competence to stand trial."[2] To require the defendant to raise the issue of competence to stand trial with no burden on the trial court to determine sanity sua sponte would lead inevitably to a waiver of the question of competence should the defendant fail to raise the issue. As the Court stated in *Pate*, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the Court determine his capacity to stand trial." at 384. Thus, in order to protect an individual's rights, the trial court bears a heavy responsibility to be certain of the defendant's capacity to stand trial prior to going forward with the case.

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2. *Pate v. Robinson*, supra, at p. 385.

An incompetent individual is in the same position as a child unable to understand the proceedings in which he is involved. His truly best interests may easily be sacrificed by his attorney for legally sound reasons by failing to raise the issue of sanity. Great care must be exercised in protecting the rights of the incompetent. If even the barest indication of the defendant's incompetence to stand trial arises, the trial court should determine the question by a full scale hearing.

There is no more basic, fundamental right than to be tried for a crime only when fully capable of comprehending and participating in the trial. To guarantee an attorney, a trial by a jury of his peers and the other important rights recognized by the Constitution and Bill of Rights and protected by this Court to an individual incapable of assisting his counsel or understanding the proceeding in which he is participating makes meaningless those very guarantees.

As the United States Court of Appeals for the Ninth Circuit recognized in *Moore v. United States*, 464 F.2d 663 (1972) and again in *Tillery v. Eyman*, 492 F.2d 1056 (1974):

> "a due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial. 'Substantial evidence' is a term of art. 'Evidence' encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the Court. Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evi-

> dence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial."

In the case at bar the murder for which Petitioner was accused was that of his ex-wife. The shooting occurred in the presence of his older child. Certainly shooting the mother of one's child before his very eyes raises some reasonable doubt as to the individual's sanity at least at the time of the commission of the offense. While this would be determinative neither of Petitioner's sanity at the time of the offense nor his capacity to stand trial, it constitutes information properly before the court bearing on Petitioner's sanity.

Further, counsel for Petitioner properly introduced into evidence a sworn pleading in which Petitioner's ex-mother-in-law stated under oath that Petitioner "has such serious psychiatric problems that all parental rights to said children should be terminated."[3] This statement was called to the Court's attention by counsel.[4] Although such statement

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3. Appendix C, p. 20.

4. Appendix D, S.F.
"Mr. Chastain: We would offer this is evidence and call particular attention to paragraph six."

is the conclusion of a lay witness made out of court, not subject to cross-examination, it properly presents the opinion of one who was well acquainted with Petitioner and his actions.

The proper test to determine whether evidence may be considered by the trial court in determining the necessity of a competency hearing should not be the ordinary rules of evidence, including, as it does, rules of hearsay and best evidence. It must be remembered that the question to be determined at this stage is not the actual capacity to the defendant to stand trial, but whether there exists a need for a hearing to determine that capacity. Thus, any information that comes to the court's attention, regardless of its source or whether it meets the requirements of the rules of evidence, that would put the court on notice that the defendant may be incompetent to stand trial should be considered by the court.

"While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." *Pate v. Robinson,* supra, at 386. Although the court in the case at bar could properly observe, Petitioner's demeanor during the short period of time in which he was before the court, such cannot be held sufficient to dispense with a competency hearing should other evidence indicate the need.

The court asked Petitioner, "Are you mentally competent at this time?" In other words, do you understand what's going on, at this time, here?"[5] To which the Petitioner responded, "Yes, sir."[6] To hold such to be suf-

5. Appendix D, S.F. 5.

6. Appendix D, S.F. 5.

ficient inquiry into Petitioner's competency to stand trial would all but eliminate any responsibility in the trial court to hold a competency hearing sua sponte. By simply asking such a question, thereby evoking the expected response, the trial court could circumvent this court's decision in *Pate v. Robinson.* It is contradictory to hold that someone incompetent could answer a question as to his competence to stand trial.

The trial judge then asked defense counsel, "Do you agree, Mr. Chastain?"[7] To which he answered, "Yes I do, Your Honor. Mr. Gonzalez is very articulate. We have had quite a number of conversations together and there is nothing the matter with his brain."[8] This statement cannot be considered to be a waiver, since "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson,* supra, at 384. Furthermore, it should not be considered a waiver since the incompetent defendant stands in a similar position to that of a child. An attorney, regardless of the validity of his motives, might sacrifice the defendant's best interests for a legal point.

At most, the statement by Mr. Chastain can be considered to be testimony of a lay witness that Petitioner was competent to stand trial. Thus, there was information indicating Petitioner was competent and conflicting information indicating that he was not competent. As *Moore v. United States,* supra, recognized, "The function of the trial court in applying Pate's substantial evidence test is not to determine the ultimate issue: "Is the defendant

7. Appendix D, S.F. 5.

8. Appendix D, S.F. 5.

competent to stand trial? It (sic) sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency." at 666. "Although there was information indicating that Tillery was in fact competent, such conflicting evidence can only be resolved by an evidentiary hearing." *Tillery v. Eyman,* supra, at 1059.

The type of crime involved in which Petitioner's son was a witness to his mother's death and the sworn petition filed by Petitioner's mother-in-law stating unequivocally that Petitioner has serious psychological problems to such a degree that all his parental rights to his children should be terminated raise a reasonable doubt as to Petitioner's competence to stand trial sufficient to require the trial court to order a competency hearing sua sponte. Although there was information presented indicating that Petitioner was competent, such conflicting evidence can be resolved only by a full-scale evidentiary hearing.

A qualified psychiatrist, Dr. Cecil Childers, made a preliminary examination of Petitioner on December 23, 1975. He indicated that further testing and consultation would be necessary to determine Petitioner's competence. A copy of his preliminary report is attached hereto as Exhibit "E."

Petitioner shall inform the Court of any findings of the psychiatrist as they are made.

A decision by this Court resolving this question would have significance far beyond this immediate case because the fundamental rights of due process accorded defendants by the Constitution and protected by *Pate v. Robinson,* supra, may be denied incompetent defendants through the failure of the trial court to order a competency hearing

when there is conflicting evidence as to competence. Further, the procedure by which the trial judge simply asks the defendant whether he is competent is a subterfuge which circumvents this Court's decision in *Pate v. Robinson.*

Resolution of this question favorably to Petitioner would require a holding that the Petitioner deserved a hearing as to his competency to stand trial. We urge the Court to make such a holding and, on the basis thereof, to reverse the judgment of the Court of Criminal Appeals of Texas and remand the case for a hearing as to Petitioner's competence to stand trial.

## CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

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Corpus Christi, Texas 78401

H. E. BOWER
412 Wilson Tower
Corpus Christi, Texas 78401

## APPENDIX A

NO. 50,826

ISABEL L. GONZALEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from NUECES County

### OPINION

This is an appeal from a conviction for murder without malice. Appellant waived a jury trial and entered a plea of Nolo Contendere; the court assessed punishment at imprisonment for 5 years. Appellant asserts that the trial court erred in failing to properly admonish him before accepting his plea, in not advising him of his right to remain silent prior to the plea, in failing to read the indictment to him or to obtain a waiver of the reading of the indictment, and in not holding a competency hearing; he also contests the sufficiency of the evidence due to a variance in the spelling of the name of the deceased in the allegations and the proof. We overrule these grounds of error and affirm the judgment.

Appellant asserts that the trial court did not admonish him as to the proper range of punishment. The appellant was indicted for murder with malice; however, the record reflects that before the plea was accepted the court recognized that the state had agreed to reduce the charge to the lesser included offense of murder without malice. The correct punishment range for murder without malice is not less than two nor more than five years imprisonment,

and the appellant was so admonished. Article 1257, V.A.P.C. The ground of error is overruled.

Appellant contends that he was not advised of his right to remain silent prior to entering his plea. Before appellant entered his plea of Nolo Contendere, the following colloquy occurred:

> "THE COURT: Is it your intention to plead guilty?
>
> "MR. CHASTAIN: May it please the Court, if I may interrupt, this is the case we discussed yesterday. It is necessary at this time to plead Nolo Contendere.
>
> "THE COURT: Before the Court accepts your plea, the Court must make sure you understand what your rights are.
>
> "You do not need to plead Nolo Contendere. You do not need to say anything; do you understand that?
>
> "THE DEFENDANT: Yes, sir."

Appellant was informed of his right to remain silent; the ground of error is overruled.

Appellant contends that the court erred in failing to read the indictment or obtaining a waiver of the reading of the indictment. Included in the record is a waiver of formal arraignment, signed by the defendant, his attorney, an attorney for the state, and the trial judge. Even though the appellant has been arraigned, when the trial is before the court without a jury, it is the better practice to read or to obtain a waiver of the reading of the indictment. However, the statutory requirement that the indictment be read is only applicable to jury trials. See Article 36.01(1), V.A.C.C.P. The ground of error is overruled.

Appellant asserts that the trial court should have conducted a hearing inquiring into the defendant's compe-

tency to stand trial. It is his contention that the reference in defense Exhibit No. 1 to "psychiatric problems" raised the issue of his competency to stand trial and that the trial court abused its discretion in not impaneling a jury on its own motion to determine the issue.

Defense Exhibit No. 1 is a copy of an adoption petition filed by the maternal grandmother of appellant's children in which she seeks to terminate appellant's parental rights. The allegations contained therein do not refer to the nature of the problem, nor is there any information supplied to explain the basis on which the pleader concludes that appellant is suffering from such problems.

Appellant testified that he had lost his temper at the time of the commission of the offense, but made no reference to having any mental problems.

Prior to accepting the plea of Nolo Contendere the trial court inquired into appellant's competency as follows:

> "THE COURT: All right. Are you mentally competent at this time? In other words, do you understand what's going on, at this time, here?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Do you agree, Mr. Chastain?
>
> "MR. CHASTAIN: Yes I do, Your Honor. Mr. Gonzalez is very articulate. We have had quite a number of conversations together and there is nothing the matter with his brain."

The test for determining competency to stand trial is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as

well as factual understanding of the proceedings against him." Bonner v. State, 520 S.W.2d 901 (Tex. Cr. App. 1975).

The facts developed are not such to show that the trial court abused its discretion in not impaneling a jury, sua sponte, to determine the appellant's competency to stand trial. Wages v. State, 501 S.W.2d 105 (Tex. Cr. App. 1973). See also Quintanilla v. State, 508 S.W.2d 647 (Tex. Cr. App. 1974); Marroquin v. State, 511 S.W.2d 58 (Tex. Cr. App. 1974). The ground of error is overruled.

Lastly, appellant complains of the sufficiency of the evidence to support the conviction; he asserts that there is a fatal variance between the spelling of the deceased's name in the indictment and that in the proof adduced. The indictment alleged the name of the deceased to be "Espernza Gonzalez." Appellant entered a judicial confession which stated the name of the deceased to be "Espernza Gonzalez." Such confession, standing alone, is enough to support a plea of Nolo Contendere. Henderson v. State, 519 S.W.2d 865 (Tex. Cr. App. 1975). There is no variance between the spelling of the deceased's name in the indictment and that contained in the judicial confession. The ground of error is overruled.

The judgment is affirmed.

PER CURIAM

(Delivered October 8, 1975)

## APPENDIX B

TRIAL COURT NO. 15611

THE STATE OF TEXAS.

TO THE 94th. Judicial District Court of Nueces County—GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 29th day of October A.D. 1975 the cause upon appeal to revise or reverse your Judgment between

Isabel L. Gonzalez, Appellant,
vs.
The State of Texas, Appellee,

No. 50,826

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

Leave to file appellant's motion for rehearing denied.

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this

behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 31st day of October A.D. 1975.

GLENN HAYNES, Clerk

TOMMY BELL, Deputy Clerk

## APPENDIX C

CAUSE NO: 119360

JUVENILE NO. 6742

IN RE: ADOPTION OF MELISSA ANN GONZALEZ AND RENO HOUSTON GONZALEZ, MINORS
IN THE DOMESTIC RELATIONS COURT
OF NUECES COUNTY, TEXAS
PETITION FOR ADOPTION

(Filed: September 24, 1974)

*To the Honorable Judge of Said Court:*

MANUELA M. ALVARADO DE LA GARZA, Petitioner, respectfully petitions this Honorable Court for leave to adopt MELISSA ANN GONZALEZ and RENO HOUSTON GONZALEZ, minors, upon and for the following facts and grounds, which are set forth under the stated headings of the statute:

I.

The Petitioner is MANUELA ALVARADO DE LA GARZA, and is of the Cacusian race. MANUELA ALVARADO DE LA GARZA is forty-four (44) years of age, having been born on August 9, 1929.

II.

The Petitioner permanently resides and is domiciled in Corpus Christi, Nueces County, Texas, and said Petitioner owns her own home and has legal title thereto.

POOR COPY

III.

The names to be given such children through adoption are MELISSA ANN DE LA GARZA and RENO HOUSTON DE LA GARZA.

IV.

One of the children is a girl, of the Caucasian race and was born on the 11th day of July, 1972, in Corpus Christi, Nueces County, Texas; the other child is a boy, of the Caucasian race, and was born on the 1st day of April, 1971, in Corpus Christi, Nueces County, Texas; that the natural mother, MARIA ESPERANZA GONZALEZ, is deceased.

V.

Such children, minors as above alleged, have resided in Petitioner's home since birth.

VI.

The living natural father of such minors is temporarily residing in Rio Grande City, Starr County, Texas, where service of citation may be obtained upon him. No consent by the father is necessary, in that his conduct amounts to a voluntary abandonment of said children, which abandonment should be considered permanent. Petitioner would show this Honorable Court that said natural father did murder the natural mother of said children in the presence of at least one of said minor children; and that said father is a man of such vile and ungovernable temper, or in the alternative, has such serious psychiatric problems that all parental rights to said children should be terminated.

VII.

In this regard Petitioner would show this Honorable Court that the minor son, RENO HOUSTON GONZALEZ, comes within the definition of Article 2330, of the Texas Civil Statutes, as a child who has no proper parental care or guardianship and who was found living in a house with vicious and disreputable persons and which child is maintained in a home that by reason of neglect, cruelty and deprivaty on the part of the person whose care of said child may be, is an unfit place for such child, and therefore, the parental rights of said natural father should be terminated by the Court and all parental rights transferred to Petitioner herein.

VIII.

Petitioner would further show this Honorable Court that on or about the 27th day of April, 1973, in the Domestic Relations Court of Nueces County, Texas, Cause No. 117,216, styled Maria Esperanza Gonzalez vs. Isabel Leonardo Gonzalez, all rights of custody, care and control of said minor children were denied to the natural father, Isabel Leonardo Gonzalez, and he was merely given reasonable visitation rights. Petitioner would show this Honorable Court that even these rights should be terminated, as the said Isabel Leonardo Gonzalez is unfit to exercise any parental rights over said minor children.

IX.

In this case waiver of the six months period of residence in the home of Petitioners is not requested because the children have resided in their home for a period exceeding six months in duration.

WHEREFORE, PREMISES CONSIDERED, Petitioner, MANUELA ALVARADO DE LA GARZA, prays the Court that after due notice, hearing and proceedings for leave to adopt the said minors, this Petition for adoption of said minors be granted in all things and for such other orders and relief as Petitioners may be entitled to either at law or in equity.

HOWARD, McDOWELL,
BENNETT & CARTWRIGHT
Attorneys at Law
315 United Savings Building
Corpus Christi, Texas 78411

By: /s/ CHAS. N. CARTWRIGHT
Chas. N. Cartwright
Attorney for Petitioner

STATE OF TEXAS )
COUNTY OF NUECES )

BEFORE ME, the undersigned authority, on this day personally appeared MANUELA M. ALVARADO DE LA GARZA and on her oath, stated that she is Petitioner in the above petition and that the matters, allegations, facts and grounds stated in such petition are true and correct.

/s/ Manuela M. Alvarado De La Garza
Manuela M. Alvarado De La Garza

SWORN TO AND SUBSCRIBED BEFORE ME by the said MANUELA M. ALVARADO DE LA GARZA this 7th day of September, 1973, to certify which witness my hand and seal of office.

( S E A L )

/s/ CAROL COX
Carol Cox

Notary Public In And For Nueces County, Texas

what your rights are.

You do not need to plead Nolo Contendre, you do not need to say anything; do you understand that?

The Defendant: Yes, sir.

The Court: The Court wishes to inform you that if the Court accepts your plea of Nolo Contendere and the Court proves you guilty, then the Court will find you guilty and assess your punishment in the penitentiary for some term of years of not less than two nor more than five; do you understand that?

The Defendant: Yes, sir.

The Court: All right. Are you mentally competent at this time? In other words, do you understand what's going on, at this time, here.

The Defendant: Yes, sir.

The Court: Do you agree, Mr. Chastain?

Mr. Chastain: Yes I do, Your Honor. Mr. Gonzalez is very articulate. We have had quite a number of conversations together and there is nothing the matter with his brain.

The Court: If you plead guilty, will you be doing so voluntarily and of your own free will?

Mr. Chastain: We're pleading Nolo Contendere.

A. Yes, sir.

Q. All right. Is that what happened to you out there at the time you couldn't see your little baby?

A. Yes, sir.

Q. Are you sorry that you killed your wife — your ex-wife?

A. Yes, sir.

Q. All right. Isabel, because of the fact that there are going to be — Oh, Your Honor, let me mark this for identification.

(Instrument tendered by Counsel for the dedefense was marked for identification as Defendant Exhibit No. 1)

Mr. Folsom: I have no objections.

Mr. Chastain: We would offer this in evidence and call particular attention to paragraph six.

I'm sorry, that is marked up so much. It was in the other cause.

Q. I would like to ask you a few questions with regard to where you've been living since this has occurred. Where have you been living?

A. Rio Grande City.

Q. Who signed your bond?

A. Eladio Carrera and Pete H. Gonzalez.

## APPENDIX E

CECIL A. CHILDERS, M.D. AND ASSOCIATES
5315 Everhart Road
Corpus Christi, Texas 78411

Area Code 512-854-4674 Psychiatry

THE STATE OF TEXAS

COUNTY OF NUECES

Before me, a notary public in and for Nueces County, Texas on this day personally appeared Cecil A. Childers, M.D., who being by me here and now duly sworn, upon oath says:

My name is Cecil A. Childers. I reside in Corpus Christi, Texas. I am a psychiatrist with degrees from The University of Tennessee.

On December 23, 1975, I made a preliminary exami- of Isabel L. Gonzalez. I met with him in the interview room of the Nueces County Jail.

It is my opinion that the murder of which Mr. Gonzalez is accused, in which he shot his ex-wife in the presence and full view of his son, should require an examination to determine the defendant's sanity at the time of the offense and his competence to stand trial. The very nature of the crime indicates that the defendant was not fully sane at the time of committing the crime. He may not have been competent to assist his counsel at trial.

My initial examination of Mr. Gonzalez indicated that a thorough examination should have been made of his competence prior to going to trial. I feel

that further tests would be helpful in determining Mr. Gonzalez's competence.

/s/ Cecil A. Childers

Subscribed and sworn to before me by the said Cecil A. Childers, this 6th day of January, 1976, to certify which witness my hand and seal of office.

/s/ GERALDINE HEITKAMP
Geraldine Heitkamp

Notary Public in and for
Nueces County, Texas

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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NO. 75-1075

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ISABEL GONZALEZ, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

## RESPONDENT'S BRIEF IN OPPOSITION

* * * * * * * *

WM. B. MOBLEY
District Attorney of
Nueces County, Texas

J. GRANT JONES
Assistant District
Attorney of Nueces
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Corpus Christi, Texas 78401

Attorneys for Respondent

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# Supreme Court of the United States

OCTOBER TERM, 1975

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NO._____

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ISABEL GONZALEZ, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

* * * * * * *

## RESPONDENT'S BRIEF IN OPPOSITION

* * * * * * *

## OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas sought to be reviewed is an unpublished per curiam opinion. 528 S.W.2d 133. Copy of such opinion is printed in Appendix A of Petitioner's Petition for Certiorari.

## JURISDICTION

The formal, procedural requisites would appear to be satisfied in this case although Respondent disputes Petitioner's assertion that rights guaranteed him by the United States Constitution have been denied him.

## QUESTION PRESENTED

Whether Petitioner was denied due process because the trial court did not sua sponte hold a preliminary hearing to determine whether he was incompetent to stand trial.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner claims that the due process clause of the 14th Amendment to the United States Constitution is involved.

## STATEMENT OF THE CASE

Petitioner was convicted of the offense of murder without malice, the victim being his ex-wife. The conviction was imposed after the trial court, without a jury, accepted a plea of nolo contendre made by Petitioner. The Texas Court of Criminal Appeals rendered a decision affirming that conviction.

By his Petition for Certiorari the Petitioner seeks review of that decision, urging the single ground that he was denied due process because the trial court did not sua sponte hold a preliminary hearing to determine whether he was incompetent to stand trial.

In support of that ground he relies upon a single item of evidence that was admitted during the proceeding conducted by the trial court to determine whether to accept the nolo plea. That item of evidence was a verified

pleading (quoted in Appendix C of the Petition for Certiorari) filed in an adoption suit by his mother-in-law after the homicide seeking to adopt the children born of the marriage of Petitioner and her deceased daughter. That pleading, in Paragraph VI, contains the following statement:

> ". . . said father [i.e. Petitioner] . . . has such serious psychiatric problems that all parental rights to said children should be terminated."

Invoking *Pate v. Robinson,* 383 U.S. 375 (1966), Petitioner contends that that statement raised a bona fide doubt as to Petitioner's competence to stand trial and put the trial court under a duty, imposed by the 14th Amendment due process clause as construed by this Court in *Pate*, to hold a preliminary competency hearing even though a hearing of that kind was not sought by either Petitioner or his retained trial counsel. That contention is wholly without merit, as we shall now show.

## ARGUMENT

Neither at the time of the admission of the aforementioned verified pleading into evidence, or at any other time, did the Petitioner or his retained trial counsel claim that Petitioner was so far a victim of psychiatric problems as to be incompetent to stand trial.

Nor did Petitioner or his retained trial counsel ask the trial court to hold a competency hearing. Nor did Petitioner or his retained trial counsel complain of that court's omission to hold a hearing of that kind.

To the contrary, both Petitioner and his retained trial counsel affirmatively negatived any idea that Petitioner

was incompetent to stand trial. This occurred during a colloquy in which the trial judge, Petitioner, and Petitioner's retained trial counsel all participated (such colloquy being quoted in Appendix D of the Petition for Certiorari). In such colloquy the trial court specifically inquired of Petitioner. "Do you understand what's going on, at this time, here?" and received from Petitioner a categorical affirmative answer. Thereafter Petitioner's retained trial counsel, responding to a question from the trial judge whether such counsel agreed, made the following unequivocal statement:

> "Yes I do, your Honor. Mr. Gonzalez is very articulate. We have had quite a number of conversations together and there is nothing the matter with his brain."

These facts showing competency of Petitioner to stand trial are undisputed. No witness, either expert or lay, challenged them.

Furthermore, there is no suggestion by the current defense attorneys who prepared the Petition for Certiorari that there existed, at the time of the hearing on the nolo plea, any witness, either expert or lay, who, if he had been called, would have expressed the opinion that at that time Petitioner was incompetent to stand trial. Nor is there any suggestion by those attorneys that they presently know of any witness, either expert or lay, who, if called to testify, would express the opinion that Petitioner at the time of the hearing on the nolo plea was incompetent to stand trial. The only psychiatrist those attorneys have found to rely on is a Dr. Childers who on January 6, 1976 gave them an affidavit (quoted in Appendix E of the petition for certiorari). That affidavit,

– though not properly before this Court because it was not part of the record made either in the trial court or on appeal, – would not help Petitioner even if it were properly before this Court since in it Dr. Childers, carefully avoiding the expression of a medical opinion that petitioner at the time of the hearing on the nolo plea was incompetent to stand trial, limits himself to the expression of the legal opinion that at that time "a thorough examination should have been made of his competence prior to going to trial."

Such being the condition of the record, it follows that no basis exists for the claim of Petitioner that there was evidence before the trial court sufficient to raise a reasonable doubt as to whether he was incompetent to stand trial and require that court to hold a competency hearing.

Petitioner's reliance on *Pate v. Robinson,* 383 U.S. 375 (1966) in support of that claim is misplaced. In *Pate* there was uncontradicted testimony of four witnesses revealing that defendant had a "long history of disturbed behavior." *Id.* 378. In the present case no witness testified that petitioner had any history of disturbed behavior. In *Pate* four witnesses expressed the opinion that defendant was insane. *Id.* 383. In the present case no witness testified that petitioner was insane. In *Pate* defense counsel throughout the proceedings insisted that defendant's present sanity was very much in issue. *Id.* 384. In the present case no similar insistence was made by petitioner's retained trial counsel, – to the contrary such counsel affirmatively attested to the Petitioner's competency.

Respondent therefore submits that *Pate* is clearly distinguishable and that neither it nor any other case cited by Petitioner may properly be invoked to support his claim that he was denied due process because the trial court did not sua sponte conduct a hearing to determine whether he was incompetent to stand trial.

## CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Wm. B. Mobley, District Attorney of Nueces County, Texas, attorney for Respondent, certify that two copies of the above and foregoing Respondent's Brief in Opposition have been served by placing same in the United States Mail, certified, postage prepaid, addressed to Mr. John J. Pichinson, 412 Wilson Tower, Corpus Christi, Texas, 78401 on this the _____ day of _____, 1976.

_____

WM. B. MOBLEY
District Attorney